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struction of the note by the father discharged the debt, yet under the statute 22 & 23 Charles, relating to distribution of estates the amount acknowledged due by the son remained an advancement. The only thing considered by the court was the effect of the destruction of the note, and not the right of the father to change an advancement to a gift which could not be reckoned as an advancement. By the statutes under which these decisions were made, all gifts by the father to a child, made towards the establishment of the child in life, if nothing were shown to the contrary, were presumed to have been made as advances.

The foregoing opinion embraces a question which seems not to have occurred in the courts so often as we should have expected. The case of *Gilbert v. Witherel*, 2 Sim. & Stu. 254, cited in the opinion, is almost the only case we have been able to find, where any light is thrown upon the question. And that seems to have been ruled, mainly, upon its particular facts and the intention presumptively arising therefrom. But, upon principle, we cannot comprehend why there should be any doubt or difficulty in the question.

The advancement towards a distributive share in an intestate estate, or a portioning off a child with the anticipation of the provisions for such child, in the parent's will, are matters resting wholly *en pais*, and cannot be regarded as definitely settled, at the time the advancement or portion is made, but must be subject to the control of the intestate, or the testator, during his life. In the case of an advancement, strictly speak-

ing, towards the distributive share in the intestate's estate, its creation depends upon being evidenced in a particular manner, and its continuance depends upon the preservation of such evidence, or, at all events, the voluntary destruction of the evidence, by which the advancement was created, must effectually destroy the effective continuance of the character of the advancement. As the intestate might originally have made it a gift, so it is but reasonable that he should be able to cancel the evidence by which it is made an advancement, either by removing it back, or making it entirely a gift. The intestate might clearly cancel the advancement by making a new gift of equal amount, without charging it as an advancement. And if he can thus indirectly cancel the advancement, there can be no good reason why he may not do it by cancelling the evidence.

I. F. R.

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*U. S. District Court, Eastern District of Virginia.*

IN RE CHAMBERLAINES.

A consignment of goods under a special contract, in which the consignee gives his acceptances for their value, payable partly at sight and partly at a future day, and agrees to account for the whole price, to guarantee the sales, and to receive a commission of ten per cent. with other stipulations, making him primarily liable for the price of the goods, falls within the principle of *Ex parte White*, in *re Nevill*, Law Rep. 4 Ch. App. 397, and is a consignment on sale, as distinguished from a consignment on *del credere* guaranty.

Though a consignor may reserve a special property in goods consigned until bills of exchange, drawn for their price, are paid to the bill holders ; yet he cannot, in a consignment on sale to a consignee, in which no such special property is reserved to protect bills drawn upon the consignee for their price, reserve a special property in notes and accounts, which the consignee may take for the goods, from persons to whom the consignee may sell them, as against other creditors of the consignee, who goes into bankruptcy.

THIS was a petition of B. C. Flannagan & Co. against the assignee of R. & H. Chamberlaine, bankrupts, claiming a special property in certain claims and accounts held by the assignee.

During the year 1873, B. C. Flannagan & Son, manufacturers, of Charlottesville, Va., had dealings with R. & H. Chamberlaine, commission merchants, of Norfolk, in a manure called the "Stonewall Fertilizer," under the following contract.

December 6th 1874.

We propose to give you the entire agency for "Stonewall Fertilizer," at Norfolk, and for the state of North Carolina, Raleigh excepted, on condition you push the sales and have a proper man to look after it, and to allow you a commission of ten per cent. for sales and guarantee.

We to draw on you at sight or short time for \$30 a ton. The price to be sold at is \$65 in Baltimore. For balance, after paying \$30, you to give your acceptances, say payable 1st December 1873 ; accounts to be rendered and settlements after the selling season is over. No charge to be made for storage during the season. Any guano left over and not sold is to be at the risk and on our account.

Respectfully,

B. C. FLANNAGAN & SON.

P. S. We agree to furnish the guano delivered in Baltimore, 100 tons to be delivered in January 1873, and balance as ordered by you. We will ship in lots to any point you may direct.

B. C. FLANNAGAN & SON.

[Across the face of the above], Accepted December 6th 1872. R. & H. CHAMBERLAINE.

On the 7th of January 1874, the following paper, was drawn and signed.

Whereas R. & H. Chamberlaine have sold as agents for B. C. Flannagan & Son, their Stonewall Guano, during the spring of 1873, according to contract between them, dated December 6th 1872, to which reference is hereby made ; they having guaranteed said sales, and whereas, according to the terms of said contract, the balance due from said Chamberlaine to said Flannagan was due and payable December 1st 1873, but owing to the failure of planters, to whom said Chamberlaine sold, to comply with their terms of purchase, the said Chamberlaine has found it impossible to meet his said acceptances at maturity, and in consequence some of them have gone to protest. The said Flannagan in order to assist the said Chamberlaine and give more time for his collection from planters, has this day taken from the said Chamberlaine, sundry acceptances, dated this day, and maturing at an interval of ten days, running to 130 days inclusive, the proceeds of which he agrees and binds himself to use in payment of said protested acceptances. And as a further assistance to the said Chamberlaine, the said Flannagan

nagan agrees that if the said Chamberlaine finds it impossible to meet the said several acceptances, dated January 7th, at maturity, the said Flannagan will further assist him by a renewal of same, and will not allow them to be protested.

The said Chamberlaine for his part agrees and binds himself to use all due diligence in collecting from the parties to whom he sold as agent of the said Stone-wall, and apply all proceeds from said parties strictly to the payment of the said acceptances, dated January 7th. It being understood and agreed that such collections are held by him as agent only, and belong properly to the payment of said acceptances aforesaid, he having sold as agent with the guarantee of payment.

B. C. FLANNAGAN & SON.

R. & H. CHAMBERLAINE.

The renewed acceptances were, ten of \$1500 each, and one of \$1000. This latter acceptance and one for \$1500, which two were the first to mature, were paid by the Chamberlaines. Those still remaining unpaid are for the aggregate sum of \$13,500. The books of the Chamberlaines showed that the amount of their actual indebtedness for the fertilizer, on the 27th April 1874, was \$13,143.59, exclusive of interest. They owed the Flannagans \$368.09 on a cotton transaction, which had no connection with the fertilizer. The amount of the outstanding accounts held by the Chamberlaines against planters for the fertilizer, on April 27th 1874, was \$13,974.04. Fertilizer was shipped to the value of \$40,000.

The Flannagans brought an action at law on the acceptances in the summer of 1874. The effect of their suit was such, that in October 1874, the Chamberlaines filed their petition in bankruptcy; and the suit stands suspended in the court of law. Under a consent order of this court in this case, the assignee in bankruptcy was allowed to employ an agent for the collection of the debts due by planters for the fertilizer, who has made some collections. The unpaid claims against the planters for fertilizer will be of slow collection, and will not realize, by a considerable per centage, the amount due upon them.

The Flannagans now come in by petition, setting forth the two contracts, and the condition of facts recited, and claiming not only that the Chamberlaines are bound for the amount of the unpaid acceptances, on which they have sued, but that the notes, accounts and claims which the Chamberlaines held against planters for the fertilizer, and which have passed to the custody of the assignee in bankruptcy, shall be turned over to themselves for collection; that when collected by themselves the amounts realized from these claims shall be credited on the amounts due on the Chamberlaines'

acceptances; and that the debt of the Chamberlaines shall be treated as a fiduciary debt, and dealt with as such in considering the petition of the Chamberlaines for discharge.

*W. W. Old*, for petitioners.

*John S. Tucker*, for assignee.

HUGHES, J.—The questions arising upon the two contracts are chiefly important with reference to the petition of the bankrupts for a discharge, though that petition is not yet before the court for hearing.

The questions now to be decided are these, viz.:—

1st. Were the shipments of this fertilizer under the contract of December 6th 1872, a mere consignment on a *del credere* guarantee, or were they on sale?

2d. If a sale, did the shipments pass the whole property in the fertilizer to the Chamberlaines, or was there a special property reserved constituting in favor of the Flannagans a preferred claim upon the proceeds of the fertilizer in the hands of the Chamberlaines?

I. It is clear that the contract of December 6th 1872, did not provide for consignments to the Chamberlaines as ordinary factors, for sale on the usual commissions. Nor did it provide for consignments upon the ordinary *del credere* commission of guaranty. Had it done either of these things, the well-settled law, either of simple or *del credere* agency, would have clearly determined the rights and liabilities of the parties.

But these consignments were not made upon any sort of implied contract. They were made upon an express contract, definite in terms, written and mutually signed. We cannot, therefore, go out of such a contract to the law of general consignments, or of *del credere* agencies, to ascertain the rights and liabilities arising from their own stipulations of these parties. It is only when there is no special contract that the general law of agency applies between consignor and consignee; for it is always competent for persons in this relation to contract according to their pleasure, and thus vary or restrict, or enlarge, the general liabilities implied by the law in absence of express contract: Story's Agency, § 334.

What were the provisions of the contract of December 6th 1872? The Chamberlaines were to be responsible for all the

sales of the fertilizer which they should make. They were to be themselves primarily responsible. They were to discharge this responsibility by acceptances payable at sight or on short time, as to part, and at a future day as to the residue of the price of the fertilizer. They were to have a commission of ten per cent., not on their own sales, but on the price of the article fixed in advance by the consignors. They were, at the end of the season of business, to be credited with so much of the article as should then remain on their hands. They were not to charge storage upon the fertilizer, but if any of it remained on hand after the season was over, they were then to be entitled to storage on such surplus. In the contract, the terms "agency," "guarantee" and "commission" are used, implying that the parties considered that in the transaction about to be made they should hold the relation to each other of principal and agent.

The question is whether this contract constituted the Chamberlaines purchasers of the fertilizer, or merely agents for its sale on a *del credere* guarantee. If the contract in its terms really constituted them purchasers, the use of words implying that they were agents does not change the fact. "Persons may suppose that their relationship is that of principal and agent, when in point of law it is not:" *Ex parte White, in re Nevill*, Law Rep. 4 Ch. App. 403. If the consignments were a sale, they were a final sale as to the portion of the fertilizer which should be disposed of during the season by the Chamberlaines; and, as to the portion remaining over at the end of the season, they were consignments on "sale or return."

Upon the authority of the case of *Ex parte White, in re Nevill*, above cited, and of section 215, Story's Agency, about to be referred to, I think the consignments were a sale, and not a shipment on a *del credere* guaranty. For, here, the obligations of the Chamberlaines to pay for the fertilizer at a fixed price, and a fixed time, was clearly established by the contract. They were primarily liable to the Flannagans for the fixed price, on their acceptances. They might sell to planters at a different price so far as the obligation imposed by the contract was concerned. If the planters were to be liable to the Flannagans at all, they were to be so only secondarily. The Flannagans looked to the Chamberlaines only, and did not know the planters in the whole transaction.

The now well-settled law of *del credere* guaranty is that the factor is not the primary debtor ; that his engagement is merely to pay the debt if it is not punctually paid by the person to whom he sells ; that he stands more in the character of a surety than a debtor ; and that he is not liable to pay the debt until there has been default by the person who buys from him : Story's Agency, sect. 215, citing numerous English and American cases. Can it be pretended that the stringent contract of December 6th left the Chamberlaines in the secondary and optional relation to the Flannagans thus described, in respect to the article which they paid for as it arrived with their acceptances ? Lord Justice MELLISH, in *Ex parte White*, distinguishes between consignments on *del credere* guaranty and those on sale, in the following explicit language : " If the consignee is at liberty to sell at any price, and to receive payment at any time he likes, but is bound, if he sells the goods, to pay the consignor for them at a fixed price and at a fixed time, in my opinion, whatever the parties may think, their relation is not that of principal and agent. The contracts of sale which [the consignee makes with the persons who purchase from him] are not contracts made on account of his principal, for he is to pay a price which may be different, and at a time which may be different, from those fixed by these contracts. He is not guaranteeing the performance by the persons to whom he sells, of their contract with him, which is the proper business of a *del credere* agent ; but he undertakes to pay a certain fixed price for the goods, at a certain fixed time, to his principal, wholly independent of what the contract may be which he makes with the persons to whom he sells ; and my opinion is that, in point of law, the alleged agent in such a case is making, on his own account, a contract to purchase with his alleged principal, and is again reselling."

The Flannagans themselves treated the consignments as a sale to the Chamberlaines. After the acceptances, which they received under the contract of December 1872, had matured, and been protested, they did not treat the Chamberlaines as their debtors on open account, in the direct character of guarantors of the sales which had been made to planters, but they treated them as directly indebted on the acceptances which remained unpaid. If the Chamberlaines had been guarantors only, their liability would not have been fixed until after proper means of collecting the dues from planters had been exhausted. But the

Flannagans declined to look to them in that character. They treated them as already indebted, and dealt with the unpaid acceptances as the evidence of their indebtedness.

Even supposing the Flannagans, by the terms of the contract of December 1872, to have reserved for themselves the option of treating the Chamberlaines either as agents or as purchasers at pleasure, yet by the contract of January 1874, they availed themselves of this option, and did elect to treat them as purchasers; for they accepted a novation of new acceptances in place of the old ones for the whole value of the fertilizer not yet paid for. It is true that the Flannagans did, to the latter contract providing for the novation, append a clause in the following words, viz.: "It being understood and agreed that such collections are held by Chamberlaine as agent only, and belong properly to the payment of said acceptances, having sold as agent with his guarantee of payment." But the most that can be claimed for this stipulation in determining the question whether the consignment was upon purchase or guarantee, is that it preserved to the Flannagans the option of electing afterwards, and a second time, whether to rely upon the new acceptances for payment of the moneys due them, or to resort to the notes and accounts due from the planters. Supposing this right of choosing between these alternatives to have been reserved, still, even in that case, the choice of the Flannagans, thus reserved, *was* made in the summer of 1874, when, instead of going against the planters as first liable to them before the Chamberlaines were so as guarantors, they ignored the planters, and brought suit against the Chamberlaines on their acceptances.

If the Chamberlaines were liable as purchasers, then the Flannagans had a right to sue them on their acceptances. If they were not liable as purchasers, but only as guarantors, then they could have been sued only after the remedy against the planters had been exhausted, on open account.

Upon the whole case, therefore, I am of opinion that not only did the contract of December, 1872, and the transactions of 1873 under it, make the Chamberlaines purchasers instead of agents; but the Flannagans, in the contract of January, 1874, and in the suit brought in the summer of that year, themselves elected to treat them as such, and committed themselves to that view of the contract.

It may be admitted that if the terms used in the writing of

January 1874, had been employed in that of December 1872, it would have been difficult to resist the conclusion that the consignments made under it were to the Chamberlaines as agents and not as purchasers. But the second contract came too late to have any effect upon the dealings. If the original paper of December 1872, provided for a sale, and the transactions under it were those of sale and purchase, then the contract of January 1874, made after all the dealings were over, could not, by any language put into it, change their character already fixed and determined. Nor could the agreement of the Chamberlaines in January 1874, to apply their collections from the planters to the payment of the acceptances, change the previously fixed fact that they were purchasers, if they really were so. That agreement was a merely voluntary one to comply with an obligation of honor.

2d. Having concluded that the consignments of the Flannagans to the Chamberlaines were made to the latter in the character of purchasers, and not of agents, it is next to be inquired whether the sale was absolute or qualified. The principle of the leading case of *Jenkins v. Brown*, 14 Ad. & Ellis N. S. 496, is that when a consignment is made, and bills of exchange are drawn for the value, and bills of lading are sent to a third person to be delivered on payment of the bills of exchange, a sale is made, in which a general property passes to the consignee, and a special property is reserved by the consignor until the payment of the value. In other words, a sale may take place on a consignment, although a special property in the thing consigned be reserved by the consignor.

In the leading case of the *Bank of Ireland v. Perry*, Law Rep. 7 Exchequer 14, it is decided, that where a consignor reserves a special property in the goods consigned, that special property follows the goods in favor of the holder of bills of exchange drawn against them, when the consignee goes into bankruptcy or composition. The principle on which the bill holder is allowed the benefit of this special property, as against other creditors of the insolvent, is explained by Bispham, in his recent tract on Contracts In Rem, to be that under the original consignment a *jus in rem* in the goods is acquired by contract, as against the world, by the drawer of the bills in favor of himself and the persons holding the bills from him; and, that being a *jus in rem* against the world, this special property follows the goods into the hands of assignees or trustees of an in-

solvent consignee. If this principle be not yet conceded in courts of law, it fully obtains in courts of equity, and must be applied in this court.

I think that the intention of the Flannagans to reserve a special property in the proceeds of the fertilizer sold by the Chamberlaines to planters is too plain to be denied. But was that intention effected? The principle of the two cases just cited is that the consignor may reserve a special property in the goods consigned, for the protection of bills which he himself draws against the goods; but they do not go so far as to hold that he may reserve a special property in favor of himself in bills which his consignee may draw upon sales of the goods which the consignee shall make. Courts of law have scarcely yet recognised the principle of the cases of the *Bank of Ireland v. Perry*, above cited, and of *Ex parte Waring*, 19 Vesey 445, and courts of equity have not advanced so far as to allow the original consignor to bind the proceeds of goods after they have been received by the consignee and sold to second consignees or purchasers. The law would have allowed the Flannagans to bind the goods in favor of the holders of the drafts drawn by themselves, but it would not follow the sale of the goods by the Chamberlaines and bind in favor of the Flannagans the notes and accounts taken by the Chamberlaines. If the Chamberlaines were now acting in their own right and were responsible, the concluding clause of the contract of January 7th 1874 would bind undoubtedly the notes and accounts due from the planters in favor of the Flannagans as against the Chamberlaines. But the bankruptcy of the latter has thrown these notes and accounts into the hands of their assignee, subject to the rights of other creditors; and it would be carrying the doctrine of *jus in rem* too far to hold that the Flannagans have a special property in those notes and accounts, as against general creditors. I am bound to decide, therefore, that the Flannagans have no special property in the notes and accounts due from planters for the fertilizer sold by the Chamberlaines, and that these *choses in action* are part of the general assets in this cause.